

**WHORES AND OTHER SEX SLAVES: WHY THE EQUATION OF
PROSTITUTION WITH SEX TRAFFICKING IN THE WILLIAM
WILBERFORCE REAUTHORIZATION ACT OF 2008
PROMOTES GENDER DISCRIMINATION**

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I. INTRODUCTION

In 1991, Teri Goodson, a prostitute living and working in San Francisco, grew angry while watching an all-male Senate Hearing Committee questioning Anita Hill about her sexual harassment claims against Clarence Thomas.¹ Teri became so upset by the way Hill was being questioned and treated that she, a commercial sex worker, immediately joined the San Francisco chapter of the National Organization for Women in

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1. Teri Goodson, *A Prostitute Joins NOW, in WHORES AND OTHER FEMINISTS* 248, 248 (Jill Nagle ed., 1997) (explaining life working as a prostitute and the benefits that many women derive from working in this industry).

order to help fight for women's rights.² Though never before involved in politics, this woman began working with different kinds of advocacy groups, eventually assisting in the addition of bills to the 1995 California Legislation Watch List.³

Contrast Teri's story with the story of four young girls police found in New Jersey in 2002 in a "squalid, land-based equivalent of a 19th-century slave ship" that contained a "rancid, doorless bathroom . . . [and] bare, putrid mattresses," antibiotics, "morning after" pills, and ulcer medication that can double as an abortion-inducer.⁴ These girls were found "pale, exhausted and malnourished."⁵ The authorities discovered that the four girls were victims of sex trafficking.⁶

2. *Id.* (describing the impetus for the author to join NOW, a women's empowerment network, while still considering sex work as a desirable career). "Unaware of just how controversial commercial sex . . . is among feminists, [Teri] initially underestimated the commitment and resources required to educate other feminists about commercial sex and win them as allies." *Id.*

3. *Id.* at 249 (discussing the author's work in political advocacy for California women). Teri Goodson "was also able to establish a prostitution committee, an action liaison between California NOW and prostitutes' groups like COYOTE." *Id.*

4. Peter Landesman, *The Girls Next Door*, N.Y. TIMES, Jan. 25, 2004, §6 (Magazine), at 30 (describing the situation that police officers found when investigating a sex trafficking ring). The author explains:

On a tip, the Plainfield police raided the house in February 2002, expecting to find illegal aliens working an underground brothel. What the police found were four girls between the ages of 14 and 17. They were all Mexican nationals without documentation. But they weren't prostitutes; they were sex slaves. The distinction is important: these girls weren't working for profit or a paycheck. They were captives to the traffickers and keepers who controlled their every move.

Id.

5. *Id.* (describing how, in the trafficking system, women are first abducted, then hazed, then brought to the United States where they try to blend in as much as possible). Landesman describes the system of abduction in this way:

In Eastern European capitals like Kiev and Moscow, dozens of sex-trafficking rings advertise nanny positions in the United States in local newspapers; others claim to be scouting for models and actresses. In Chisinau, the capital of the former Soviet republic of Moldova—the poorest country in Europe and the one experts say is most heavily culled by traffickers for young women—I saw a billboard with a fresh-faced, smiling young woman beckoning girls to waitress positions in Paris. But of course there are no waitress positions and no "Paris." Some of these young women are actually tricked into paying their own travel expenses—typically around \$3,000—as a down payment on what they expect to be bright, prosperous futures, only to find themselves kept prisoner in Mexico before being moved to the United States and sold into sexual bondage there.

Id.

6. *Id.* (quoting one officer as saying, "I consider myself hardened," though shocked at what was in this house). The officer, a special agent with Immigration and Customs Enforcement, also stated, "I spent time in the Marine Corps. But seeing some of the stuff I saw, then heard about, from those girls was a difficult, eye-opening experience." *Id.*

The difference between these two stories is elementary: in one, an adult woman is fighting for her ability to be paid for consensual sex; in the other, four underage girls are being forced to have sex for no compensation under inhumane working conditions.⁷ The two situations seem starkly different, yet the laws dealing with sex trafficking and prostitution in the United States increasingly combine them as one unified activity.⁸ In actuality, the two are distinguished by one fundamental difference: consent of the woman having sex. As society continues to debate legislation regarding sex trafficking, many wish to see the sex industry die out completely.⁹ This hope is neither realistic nor beneficial to the women who choose prostitution as a means of making a living.

Every year, a minimum of "14,500 to 17,500 people are trafficked into the United States."¹⁰ Unfortunately, between 2000 and 2007, the Department of Justice only prosecuted approximately 110 sex trafficking cases.¹¹ In 2000, the United States passed the Victims of Trafficking and Violence Protection Act (VTVPA) in order to more effectively end the practice of sex trafficking in this country.¹² The VTVPA denounces sex trafficking

7. See Teri Goodson, *A Prostitute Joins NOW*, in *WHORES AND OTHER FEMINISTS* 248, 248 (Jill Nagle ed., 1997).

8. See, e.g., Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(a)-(b), 114 Stat. 1464, 1466 (2000) (codified at 22 U.S.C. § 7101(a)-(b)) (stating that the need for a new law combating sex trafficking is due to expansion of the sex industry). "The sex industry has rapidly expanded over the past several decades . . . [with] . . . [a]pproximately 50,000 women and children . . . trafficked into the United States each year." *Id.* § 102(b)(1)-(2).

9. See John R. Miller, Op-Ed., *The Justice Department, Blind to Slavery*, N.Y. TIMES, July 11, 2008, at A17, available at 2008 WLNR 12997772 (arguing against the Department of Justice's stance on the reauthorization of the Victims of Trafficking and Violence Protection Act of 2000). Miller explains:

The department strongly objects to a provision that would make it easier to prosecute pimps, the chief slaveholders in the United States. The Justice Department opposes taking away from pimps the defense that they did not know a child's age. And it opposes easing the requirement to prove force, fraud or coercion in order to prosecute a pimp for human trafficking.

Id.

10. Kenneth Franzblau, Letter to the Editor, *The Justice Department and Sex Trafficking*, N.Y. TIMES, July 23, 2008, available at 2008 WLNR 13700585.

11. *Id.* (explaining that, "[u]nfortunately," the senators that proposed the reauthorization did not support the amendments). Franzblau is the Trafficking Program Director of Equality Now, an international human rights organization for the rights of women and girls. *Id.*

12. See Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466 (2000) (codified at 22 U.S.C. § 7101) ("As the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today.").

and criminalizes it on a federal level.¹³ Sex trafficking is vile and inhumane and is truly the last form of slavery in this country.¹⁴ But more and more people, men and women, are beginning to believe that prostitution is a choice made by an individual who wants to use his or her body as a means of making a living wage.¹⁵ This split opinion, therefore, calls for reevaluation of our country's perspective on prostitution and whether equating it with sex trafficking, in which women are coerced or physically forced into prostitution, is fair to those women who are choosing prostitution of their own volition. For the law to equate sex trafficking with prostitution is to effectively equate women who are voluntary sex workers with women who are unwillingly *forced* to be sex slaves.

In 2008, Congress passed a resolution to reauthorize the VTVPA from 2008 until 2011.¹⁶ Entitled House Bill 3887, the resolution was intro-

13. See generally *id.*

14. See generally *id.*

15. See, e.g., Erotic Service Providers Union, <http://espu-ca.org/wp/> (last visited June 24, 2009) (promoting an organization that supports unionization and safe sex practices for sex workers throughout the world as well as the decriminalization of prostitution in the United States); see also Call Off Your Old Tired Ethics ("COYOTE"), <http://www.bayswan.org/COYOTE.html> (last visited June 24, 2009) (advertising an organization that fights for the rights of sex workers in the United States). There is a large base of feminist thought, dating back to the 1970s, concerning prostitution and its negative effects on women. See, e.g., Catharine MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 20 (1993). Catharine MacKinnon, a renowned feminist figure and staunch anti-prostitution advocate, suggested that prostitution "subordinates and exploits and disadvantages women as women in social life." *Id.* This is a view that many feminist legal scholars have advocated in discussions of the legality of prostitution. See, e.g., Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 349 (2006) (discussing the divergent approaches to anti-sex trafficking efforts). There is, however, a growing number of people who believe that prostitution is a valid form of employment and who not only support decriminalization of sex work, but also encourage support for feminist and human rights values. See, e.g., Mary Joe Frug, *A Post Modern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1054 (1992) ("[A]nti-prostitution rules terrorize the female body."). Much of this support comes from feminist doctrine asserting that women have the power to consent to sexual activity and that the absolute ban on prostitution on the premise that all prostitutes are forced to have sex is inherently derogatory to women's sexuality. *Id.* But the generational differences in feminist perspectives on sex work, as well as the individual differences in belief, make it difficult to present one united stance on prostitution for all women who identify as feminists. Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 349 (2006).

16. See generally William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (1st Sess. 2007) ("An act to authorize appropriations for fiscal years 2008 through 2011 for the Trafficking Victims Protection Act of 2000, to enhance measures to combat trafficking in persons, and for other purposes.").

duced to the House of Representatives as the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007.¹⁷ This bill not only introduced new sex trafficking offenses, such as “sex tourism,” encompassing anyone who knowingly arranged for the travel of an individual for the purpose of prostitution, but also introduced a new offense called “sex trafficking,” despite the fact that the concept of sex trafficking has been a federal crime since the passage of the original VTPA.¹⁸ This bill would effectively turn prostitution into a federal crime by equating the practice with sex trafficking.¹⁹ The bill was passed in the House but was introduced as a different bill in the Senate.²⁰ While neither of these bills passed in both chambers, both houses voted on a third bill in December 2008 that contained only the “sex tourism” ban and not the new “sex trafficking” offense.²¹ Because the reauthorization was for funding for trafficking enforcement, it is likely that the controversial bill’s language was edited in order to procure the funding before the year was over. The VTPA, however, was reauthorized in 2003, 2005, and again in 2008 to last only until 2011, at which point funding must be reauthorized.²² It is, therefore, important that the resolution that passed in the House should not be introduced again. This, in addition to the wording of the VTPA already passed in 2000, would essentially strengthen all anti-prostitution laws already in place and turn common acts of prostitution into federal

17. *Id.* § 1(a).

18. *See id.* § 221(f)(1), (g)(1) (“Chapter 117 of title 18, United States Code, is amended by inserting at the end the following [new statute entitled sex tourism].”); *see also* 18 U.S.C. § 1591(a) (2008) (defining and banning the trafficking of children into sexual slavery).

19. *See* H.R. 3887 § 221(f)(1). Stating:

Whoever knowingly, in or affecting interstate or foreign commerce, within the special maritime and territorial jurisdiction of the United States, or in any territory or possession of the United States, persuades, induces, or entices any individual to engage in prostitution for which any person can be charged with an offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

Id.

20. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, S. 3061, 110th Cong. (1st. Sess. 2008) (proposing the same reauthorization of the VTPA in the Senate).

21. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2d Sess. 2008) (enacted).

22. Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. (1st. Sess. 2003) (authorizing appropriations for the VTPA for 2004 and 2005); *see also* Trafficking Victims Protection Reauthorization Act of 2005, H.R. 972, 109th Cong. (1st. Sess. 2008) (authorizing appropriations for the VTPA for 2006 and 2007); H.R. 3887, (authorizing appropriations for the VTPA for 2008 through 2011).

crimes.²³ Congress should not include this provision in the next reauthorization.

This Comment will examine the potential problems with the next reauthorization of the VTVPA if Congress reintroduces the new sex trafficking language in 2011. It will discuss the way in which prostitution is viewed in this country, both currently and in the past, and will argue that strengthening prostitution laws by equating prostitution with sex trafficking augments existing bias against female prostitutes and derails efforts to eliminate sex trafficking. Part II examines, in detail, the reasons why House Bill 3887's proposed amendment to the United States Code is ineffective and discriminatory. Since the new bill would simultaneously federalize a crime that many do not agree should be punished and generalize the inability of females to consent to engage in commercial sex, the bill is both discriminatory and unduly punitive. Part III analyzes the existing gender bias in the prostitution laws of different states. Due to the fact that these laws are already facially discriminatory, they should not be strengthened by becoming federal crimes. Part III also presents arguments supporting the decriminalization of prostitution in the United States and the ways in which this may not only strengthen women's rights, but also help eradicate sex trafficking.

II. LEGAL BACKGROUND

The most common form of prostitution is the female prostitute catering to the male client, which is reflected in both history and law.²⁴ While prostitution is colloquially known as one of the oldest professions, Ameri-

23. See Brian W. Walsh & Andrew M. Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, Legal Memorandum #21, The Heritage Foundation, Feb. 14, 2008, available at http://www.heritage.org/Research/LegalIssues/upload/lm_21.pdf (arguing that this bill would turn all forms of prostitution into federal offenses). The bill "trivializes the seriousness of actual human trafficking by equating it with run-of-the-mill sex crimes—such as pimping, pandering, and prostitution—that are neither international nor interstate in nature." *Id.* The effect would be to unconstitutionally federalize local crimes. *Id.*

24. Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 240 (2000) (discussing how "[m]ost of the historical evidence, legal and otherwise, relating to the prostitution prohibition assumes that prostitution is a female service catering to a male consumer"). Though female-male prostitution is most common, however, male-female and male-male prostitution is on the rise. *Id.* "The little evidence that does exist indicates that male prostitutes . . . suffer many of the same hardships as their female counterparts . . . [but] . . . the longevity of a male prostitute's career appears to be much less than that of a female prostitute." *Id.* at 240–41.

can lawmakers' interest in the ramifications of prostitution is a recent phenomenon.²⁵

Prostitution originally had very few legal implications in other societies; for example, while prostitution was first recorded in Rome in 180 BC, it was not until 1665, in the Court of Versailles, that an ordinance was passed to prohibit it.²⁶ While the practice of prostitution was generally accepted by both men and women, banning it contributed to existing discrimination against women via sexual double standards already in place.²⁷ It was not until 1869 that the first known challenge to the enactment of anti-prostitution laws was made by an English woman named Josephine Grey Butler, who contested the Contagious Disease Acts of 1869 because it subjected women to crude medical examinations, while exempting men engaged in commercial sexual activity.²⁸ Successful repeal of the acts allowed English society to reevaluate its perception of women under these newly created anti-prostitution laws.²⁹

The discriminatory treatment of women prostitutes continued as American society evolved.³⁰ In early colonial America, prostitution was not only legal, but abundant.³¹ By the end of the nineteenth century, prostitution was an open and visible practice that maintained itself

25. See Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 427–31 (1998) (describing the history of prostitution and its banishment from civil society via anti-prostitution laws in order to explain a bias present in modern anti-prostitution laws). “Prostitution was first recorded in Rome . . . in 180 BCE.” *Id.* at 429. But the first federal legislation against prostitution was not passed until 1910. *Id.* at 431.

26. *Id.* at 429 (explaining the origins of prostitution laws in other countries). For example, prostitution began to be regulated in France during the French Revolution, when military effectiveness was undermined due to the widespread debilitating effect of venereal disease. *Id.* Later, England passed the Contagious Disease Acts of 1869, and, eventually, town leaders in the United States attempted to regulate prostitution “through a series of local ordinances dealing with fornication, bawdy houses, night walking, and adultery.” *Id.* at 429–30.

27. *Id.* (“Since ancient times, two major themes of prostitution have emerged . . . [one is] . . . the sexual double standard [that] has dominated all practices regarding prostitution.”).

28. *Id.* at 429–30 (citing KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 14 (2d ed. 1984) (1979)) (explaining Butler’s attempts at battling the Contagious Disease Acts of 1869). The spread of venereal disease “motivated interest in regulating prostitution.” *Id.* at 429. Despite the fact that women were subject to this scrutiny, male clients were exempt. *Id.* at 430. The Contagious Disease Acts were repealed in 1886. *Id.*

29. See *id.* (stating that Butler’s was “the first known feminist challenge” to a prostitution law).

30. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 430 (1998).

31. *Id.* (stating that American “[p]rostitutes were tolerated, but considered a disgrace”).

through legal brothels.³² While it was considered a lowbrow way to make a living, prostitution was widely tolerated and unofficially regulated.³³

Over time, many American women were forced into legal prostitution.³⁴ Frequently during American colonization, "Native American women, slaves, and indentured servants were coerced into [sexual] slavery."³⁵ Later, particularly during the gold rush of the late nineteenth century, many women were forced into prostitution to make ends meet during difficult financial times.³⁶ What was originally a viable business option for women became problematic in the last decades of the nineteenth century, when some were forced to join brothels against their wills.³⁷ This practice became known as "white slavery" and continued until the early twentieth century.³⁸ It was this phenomenon that propelled Congress to pass the White-Slave Traffic Act in 1910.³⁹ This act made interstate transportation of women for the purposes of prostitution illegal.⁴⁰ Commonly known as the Mann Act, this was the first federal anti-prostitution legislation in America, and its beneficial effects for women in prostitution were far-reaching due to its focus on the transportation of women across state borders, rather than on prostitution itself.⁴¹ The debate regarding whether or not to ban sexual slavery continued in

32. *Id.*

33. Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 241 (2000) ("Widespread toleration and de facto regulation quickly sparked the sexual purity movement, which sought to repress prostitution entirely."). The sexual purity ideology questioned the double standard sanctioning a certain "degree of sexual licentiousness" on the part of men but, on the other hand, mandated that women maintain a strict standard of sexual conduct. *Id.*

34. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 430 (1998).

35. *Id.* (stating that women who were accused of sexual misconduct were "often punish[ed] by fines, banishment, flogging or embarrassment in public squares").

36. *Id.*

37. *Id.*

38. *See id.* (describing how, "[d]espite a flourishing, public and tolerated business of prostitution in the nineteenth century . . . attention once again shifted to the negative consequences of prostitution on military effectiveness during the Civil War").

39. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 431 (1998); *see also* White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825-27 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)).

40. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825-27 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)). The original version of the act sought to regulate interstate and foreign commerce "by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes." *Id.*

41. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 431 (1998).

the Legislature, but the formation of women's groups throughout the country effectively kept a complete ban on prostitution out of the laws.⁴²

Due to increasing concern over venereal disease among soldiers during World War I, Congress passed a prostitution ban in the Selective Service Act.⁴³ This ban focused specifically on the females engaging in prostitution.⁴⁴ The logic behind the bill was not to protect the women engaging in prostitution from disease, but to prevent these "fallen women" from infecting the male troops.⁴⁵ In the history of prostitution laws, what began as a movement to protect trafficked women eventually became the first federal ban on commercial sex in the United States that was created to protect males instead.⁴⁶

As industrialization commenced, America became increasingly concerned about the health and morals of society and began taking steps toward the passage of laws prohibiting both alcohol and commercial sex.⁴⁷ Society's interest in purifying the public morals took center stage, particularly in the realm of combating prostitution.⁴⁸ In fact, "the abolitionism of the mid-to-late nineteenth century became . . . an uneasy alliance between sexual purity and social hygiene, coexisting under the banner of 'moral hygiene.' . . ." ⁴⁹ Those whose goal was to continue the prohibition of prostitution feared that society itself was degenerating.⁵⁰

42. *Id.*

43. *Id.* at 431–32 (quoting an officer from the Sanitary Corps as saying, "[t]he greatest destroyer of man-power is venereal disease . . . [thus] . . . [f]or military efficiency and for social welfare—prostitution must go"); see also Selective Service Act, ch. 15, 40 Stat. 76–83 (1917).

44. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 427, 432 (1998).

45. *Id.* (citing ESTELLE B. FREEDMAN, *THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA 1830-1930* 147 (1981)).

46. *Id.*

47. See generally Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 *SUFFOLK U. L. REV.* 235 (2000) (analyzing the historical impact of government regulation upon alcohol, prostitution, and drugs). "During the first half of the twentieth century, the fights against the saloon and the brothel were the most significant programs of moral regulation." *Id.* at 237. Despite the desire during this time to emphasize morality in order to "save" society, "selective enforcement along class or ethnic lines; a general lack of effectiveness in achieving any of the goals set forth at their inception; and a plethora of unintended social costs," were the results of this morals-based prohibition period. *Id.*

48. *Id.* at 241–42.

49. *Id.* at 242 (pointing out that "medically grounded regulations [came] to play an increasingly dominant role in the general prohibitory scheme"). Federal and state legislators soon followed suit in the face of social pressures and began to pass laws regulating prostitution and "white slave traffic." *Id.*

50. *Id.* ("Prostitution not only threatened the family, the foundation of the respectable classes, but because brothels were often operated by immigrants in poor neighbor-

Congress then reacted to these social pressures, and in 1919 passed the Standard Vice Repression Law, making all prostitution illegal and effectively setting the tone for all prostitution laws thereafter.⁵¹

The prostitution laws currently in place in America continue to criminalize the act of prostitution as a vile act of moral turpitude.⁵² Since the creation of the Standard Vice Repression Law, every state but one has passed a law criminalizing prostitution in some manner.⁵³ Each state has done this in one of three ways: by prohibiting the solicitation of sex acts, by banning commercial sex itself, or by creating a criminal stigmatizing label, known as "common nightwalkers," for those who have been convicted of prostitution.⁵⁴ The one exception in the United States is Nevada, which regulates prostitution but does not criminalize it.⁵⁵

The most modern federal statute addressing the subject, the VTVPA, is separated into three sections.⁵⁶ The first section deals with trafficking and prostitution laws and is entitled the Trafficking Victims Protection Act of 2000.⁵⁷ The defined purpose of this section is to "combat trafficking in persons, a contemporary manifestation of slavery, the victims of which are predominantly women and children," and "to ensure just and effective punishment of traffickers, and [to] protect their victims."⁵⁸ The section defines "commercial sex act" as "any sex act on account of which anything of value is given to or received by any person."⁵⁹ The section

hoods, they were seen as evidence of the perceived inferiority of the ethnically diverse lower classes.").

51. *Id.* at 242–43 (listing the anti-prostitution laws that were passed by Congress during this time, including the Standard Vice Repression Law of 1919).

52. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 433–34 (1998).

53. *See id.* (stating that in the past, however, these nationwide anti-prostitution laws lacked uniformity); *see also* RICHARD SYMANSKI, *THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES* 86 (1981). Symanski notes:

In 1973, 44 states had laws against soliciting, 38 prohibited commercial sex acts and 13 had statutes against being a prostitute. Forty states had two or more of these statutes and five had all three In addition to state laws prohibiting prostitution, cities of all sizes have similar kinds of regulations.

RICHARD SYMANSKI, *THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES* 86 (1981).

54. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 433 (1998).

55. *See generally* Micloe Bingham, *Nevada Sex Trade: A Gamble for Workers*, 10 YALE J.L. & FEMINISM 69 (1998) (discussing the differing views on prostitution throughout the United States and comparing all other states' prostitution with Nevada's laws).

56. *See generally* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-326, 114 Stat. 1464 (2000) (codified as amended in scattered titles of U.S.C.).

57. *See id.* § 102(b)(14), 114 Stat. at 1466.

58. *Id.* § 102(a).

59. *Id.* § 103(3).

defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”⁶⁰ The inherent problem with the statute is the definition of sex trafficking, which does not require coercion to distinguish it from common prostitution.⁶¹ While the statute does discuss penalties for sex trafficking as the product of coercion, the basic definition of sex trafficking requires only having sex in exchange for something else, regardless of whether the act is coerced.⁶²

The first section of the VTVPA states:

Existing legislation and law enforcement in the United States . . . are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. The seriousness of [sex trafficking] and its components is not reflected in current sentencing guidelines.⁶³

Therefore, it follows that this legislation is meant to compel the federal government to impose harsher punishment upon sex traffickers, who, by definition, harbor people for commercial sex acts, without any further requirement for coercion or involuntariness.

The original VTVPA was promulgated in 2000.⁶⁴ The amended Violence Against Women Act, another division of the VTVPA, was struck down by the Supreme Court that same year.⁶⁵ The entire VTVPA went up for reauthorization in 2003 and was passed that same year as the Trafficking Victims Protection Reauthorization Act of 2003.⁶⁶ In 2007, House

60. *Id.* § 103(9) (defining the term “sex trafficking”).

61. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103(9), 114 Stat. at 1470 (defining sex trafficking as not requiring coercion). This definition was adopted when Congress introduced House Bill 3887, defining the offense of sex trafficking in a similar manner and also without a qualifier for coercion. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong., § 221(f)(1) (1st Sess. 2007).

62. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §103(9), 114 Stat. at 1470.

63. *Id.* §§ 102(a)(14)-(15) (noting loopholes in current laws that allow “even the most brutal instances of trafficking in the sex industry . . . [to be] . . . punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment”).

64. *Id.*

65. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding the Violence Against Women Act of 1994 unconstitutional). “Congress’ effort in [the Violence Against Women Act] to provide a federal civil remedy can be sustained neither under the commerce clause nor under . . . the Fourteenth Amendment.” *Id.*

66. Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. (1st Sess. 2003) (enacted).

Bill 3887 was introduced to Congress as the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007.⁶⁷ Written to reauthorize the Victims of Trafficking and Violence Protection Act, this resolution created new offenses, including “sex trafficking,” which essentially made common prostitution a federal crime.⁶⁸ House Bill 3887 passed in the House of Representatives but never reached a vote in the Senate.⁶⁹ The resolution had a companion bill in the Senate, introduced separately as Senate Bill 3061: The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.⁷⁰ This bill was less controversial because it did not include a new “sex trafficking” offense, but rather only included a new offense, entitled “sex tourism.”⁷¹ This bill, however, never reached a vote in either the Senate or the House.⁷²

While these bills remained in their respective chambers of Congress, a third bill, House Bill 7311, entitled the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, was introduced in December 2008.⁷³ This bill was quickly passed by the House and the Senate without objections from either chamber and was signed into law on December 23, 2008.⁷⁴ The enacted bill does not include any of the extra offenses that were introduced by the preceding bills.⁷⁵

The VTVPA has been reauthorized in 2003, 2005, and most recently in 2008, and is currently in effect only until 2011, at which point funding must be reauthorized.⁷⁶ It is, therefore, important that the resolution that passed in the House is not brought to the table again. This, in addition to the wording of the VTVPA already passed in 2000, would essentially strengthen all anti-prostitution laws already in place and turn common

67. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. § 21(a) (1st Sess. 2007).

68. *Id.* § 221(f)(1).

69. GovTrack, H.R. 3887 [110th]: William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-3887> (last visited June 28, 2009).

70. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110th Cong. § 1(a) (2d Sess. 2008).

71. *Id.* § 224(a) (making new provisions for sex tourism but not for a new crime of sex trafficking).

72. GovTrack, S. 3061 [110th]: William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, <http://www.govtrack.us/congress/bill.xpd?bill=s110-3061> (last visited June 28, 2009).

73. *Id.*

74. *Id.* The bill was signed into law by President George W. Bush on December 23, 2008. *Id.*

75. See generally William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2d Sess. 2008) (enacted).

76. *Id.*

acts of prostitution into federal crimes. This is unacceptable for several reasons to be discussed at length in Part III.

There is currently debate in the media on both sides of the issue.⁷⁷ While some believe that there are good reasons why prostitution laws should be strengthened in order to prevent sex trafficking, there are others who believe that sex work is a viable option for making a living that revolves around consensual, adult sex.⁷⁸ The matter continues to be debated as Congress discusses and decides whether to reauthorize the VTPA as it stands or to deter sex traffickers in the United States by strengthening anti-prostitution laws on a federal level.

III. ANALYSIS

The VTPA should not strengthen prostitution laws by equating commercial sex with sex trafficking. The VTPA reauthorization bill that passed in 2007 presents several issues in the equation of commercial sex with sex trafficking and, while it was not signed into law, could present problems if reintroduced in 2011. Furthermore, state prostitution laws are still discriminatory against women,⁷⁹ thus making the strengthening of these laws even more burdensome to equal gender rights. The disproportionately high rate of arrest for prostitution-related crimes for women, as compared with men,⁸⁰ would only be worsened by the federalization of prostitution laws. Lastly, decriminalizing prostitution might be a better means to end sex trafficking.

77. Compare John R. Miller, Op-Ed., *The Justice Department, Blind to Slavery*, N.Y. TIMES, July 11, 2008, at A17, available at 2008 WLNR 12997772 (arguing against the Department of Justice's stance on the reauthorization of the VTPA of 2000), with Kenneth Franzblau, Letter to the Editor, *The Justice Department and Sex Trafficking*, N.Y. TIMES, July 23, 2008, available at 2008 WLNR 13700585 ("From the passage of the Trafficking Victims Protection Act of 2000 through 2007, the Department of Justice has undertaken only about 110 sex trafficking prosecutions. This is a result of onerous standard of proof required by the act to convict human traffickers.").

78. Compare John R. Miller, Op. Ed., *The Justice Department, Blind to Slavery*, N.Y. TIMES, July 11, 2008, at A17, available at 2008 WLNR 12997772, with Kenneth Franzblau Letter to the Editor, *The Justice Department and Sex Trafficking* N.Y. TIMES, July 23, 2008, available at 2008 WLNR 13700585.

79. See Kate Decou, *U.S. Social Policy on Prostitution: Whose Welfare is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 429 (1998).

80. 63C AM. JUR. 2D *Prostitution* § 6 (2009) (citing *In re Elizabeth G.*, 126 Cal. Rptr. 118, 122 (Cal. Ct. App. 1975)) (noting the striking percentages of females arrested for prostitution-related offenses).

A. *VTVPA and Its Reauthorization Plan Too Broadly Generalize and Punish Prostitutes*

Both the original VTVPA and House Bill 3887 are problematic because they equate prostitution with sex trafficking.⁸¹ The original VTVPA, promulgated in 2000, includes congressional findings reflecting the opinion that prostitution lends itself to sex trafficking.⁸² In the findings, Congress concluded that “[m]any of these persons are trafficked into the international sex trade, *often* by force, fraud, or coercion.”⁸³ Congress specifically used the word “often” when describing sex trafficking, rather than “exclusively” or “in a majority of cases,” signaling that the sex industry is not the only reason that sex trafficking exists.⁸⁴ However, Congress did not provide any particular statistics or stories to validate this assertion.⁸⁵ Furthermore, in the next sentence, Congress provided a list of activities that deal with the sex industry without explaining the link between “commercial sex services” and sex trafficking.⁸⁶ The act does not explain why sex work has a negative impact on trafficking; rather, the drafters assumed that the growth of the sex industry in the last few years has had a negative impact on coerced sex work.⁸⁷ These findings set the stage for the remainder of the act by denouncing sex work as the immediate cause of human sex trafficking.⁸⁸

The original VTVPA also stated that “the seriousness of [sex trafficking] *and its components* [was] not reflected in current sentencing guidelines.”⁸⁹ Congress specifically inserted the phrase “and its components” to allow leeway in the enforcement of these statutes but failed to explain

81. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466 (2000) (codified at 22 U.S.C. § 7101); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (1st Sess. 2007).

82. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466 (explaining the devastating numbers of women and children that are trafficked internationally every year and blaming the rising sex industry for this phenomenon).

83. *Id.* § 102(b)(2) (emphasis added) (following a finding that every year, approximately fifty-thousand people are trafficked into the United States).

84. *See id.* (emphasis added).

85. *See id.*

86. *Id.* (“The sex industry has rapidly expanded over the past several decades [and] involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services.”).

87. *See* § 102(b) (enumerating each congressional finding but citing to no authority).

88. *See id.* § 102(b)(2), (3) (stating that the sex industry “involves sexual exploitation of persons,” despite the fact that “trafficking in persons is not limited to the sex industry”).

89. *Id.* § 102(b)(15) (emphasis added) (stating that this results in “weak penalties for convicted traffickers”).

what the phrase means.⁹⁰ Congress did not enumerate what these “components” are, indicating a broad spectrum of acts that may be considered “components” of human trafficking.⁹¹ The statement was most likely meant to include the variations of the sex industry, but this is not supported by statistics, only by the mere assertion that the sex industry is simply a “component” of sex trafficking.⁹²

While the original VTVPA had elements that attempted to link sex trafficking with prostitution, the original proposed reauthorization plan of 2007 (House Bill 3887) unequivocally combined the two.⁹³ House Bill 3887 would do away with the law currently in place and replace it with new offenses specifically designated as “sex trafficking.”⁹⁴ Under this new definition, any person who “persuades, induces, or entices any individual to engage in prostitution” is a sex trafficker and may be imprisoned for up to ten years.⁹⁵ In other parts of the United States Code, “prostitution” has been replaced with the phrase “commercial sex,” which is defined as “any sex act on account of which anything of value is given or received by any person.”⁹⁶ Combining these definitions would mean that anyone who persuades, induces, or entices any person to engage in any sex act “for which anything of value is given or received” receives up to ten years in prison for a federal crime.⁹⁷ Therefore, a female prostitute who entices someone to engage in a sex act in exchange for something of value may receive time in federal prison because the reauthorization would create a new federal offense encompassing com-

90. *Id.*

91. *Id.*

92. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466 (2000) (codified at 22 U.S.C. § 7101).

93. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. § 221(a)(1), (f)(1) (1st Sess. 2007).

94. *Id.* (repealing § 1591 of the United States Code and establishing a new offense to be inserted into Chapter 117 of Title 18). The resolution proposes the repeal of § 1591 and the addition of new sex trafficking offenses: “Aggravated sex trafficking” and “Sex trafficking.” *Id.*

95. *Id.* § 221(f)(1) (requiring that any individual who is charged with this offense or attempting to commit this offense is to be imprisoned for a maximum of ten years, fined, or both).

96. *E.g., id.* § 221(e)(1) (stating that the current statute regarding sex trafficking, 18 U.S.C. § 1591, would be eliminated and a new law entitled “Aggravated sex trafficking” would be inserted at 18 U.S.C. § 2429, which defines “commercial sex”). In 2002, § 1591 was changed by replacing the word “prostitution” with “commercial sex act.” *See* U.S. SENTENCING GUIDELINES MANUAL ch.2, pt. G, refs & annos (2002). The change was made in order to enforce stricter punishments against trafficking of children by simplifying the language, not to change the nature of the offense. *Id.* Because of this change, the words “commercial sex act” and “prostitution” are used synonymously. *See id.*

97. *See id.* § 221(e)(1), (f)(1).

mon prostitution-related offenses.⁹⁸ According to the Department of Justice, this reauthorization “would equate every instance of adult prostitution with the worst forms of labor and sexual exploitation, the ones often called ‘modern-day slavery.’”⁹⁹

Equating prostitution with sex trafficking has been rejected by independent legal scholars as well as by the Department of Justice.¹⁰⁰ One reason for this rejection is the fact that sex trafficking, as currently defined in the United States Code, requires proof of the elements of force, fraud, or coercion.¹⁰¹ The new offense proposed in House Bill 3887 does not.¹⁰² This is problematic because, without requiring proof of the use of force or manipulation of some sort, there is no way to distinguish a consensual sex act from one produced by coercion. The Coalition Against Trafficking in Women argues that proving force, fraud, or coercion in sex trafficking cases is unnecessary and ultimately harmful for women victims.¹⁰³ The Coalition argues that the burden upon prosecutors to prove

98. Brian W. Walsh & Andrew M. Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, Legal Memorandum #21, The Heritage Foundation, Feb. 14, 2008, available at http://www.heritage.org/Research/LegalIssues/upload/lm_21.pdf (proposing that House Bill 3887 would reauthorize the VTVPA in such a way that would “purportedly transform all pandering, pimping, and hiring of a prostitute into federal crimes”).

99. Press Release, U.S. Dep’t of Justice, H.R. 3887 The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 as Passed by the House of Representatives on December 4, 2007 (Dec. 4, 2007), available at <http://www.usdoj.gov/olp/pdf/doj-position-on-hr3887.pdf> (arguing against the reauthorization bill because “[t]he federal government should not be diverted from its core anti-trafficking mission against crimes involving force, fraud, or coercion and child victims . . . [because] . . . [s]tates are better situated to combat adult prostitution”).

100. *Id.*

101. 18 U.S.C. § 1591(a) (2008) (“Whoever knowingly . . . benefits, financially or by receiving anything of value . . . knowing . . . that means of force, fraud, [or] coercion . . . will be used to cause the person to engage in a commercial sex act . . . shall be punished as provided in subsection (b).”). Depending on the gravity of the sex trafficking offense, punishment includes fines and imprisonment ranging from ten years to life. *Id.*

102. See H.R. 3887 § 221(f)(1) (proposing that “[w]hoever knowingly . . . induces, or entices any individual to engage in prostitution . . . shall be fined under this title or imprisoned not more than 10 years, or both”). But see Letter from Christopher Toth, Acting Executive Dir., Nat’l Ass’n of Attorneys Gen., to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary, and Arlen Specter, Ranking Member, Senate Comm. on the Judiciary (Mar. 7, 2008), available at <http://www.usdoj.gov/olp/pdf/naag.pdf> (stating that “[r]emoval of these elements for federal prosecution blurs the line between conduct that implicates the despicable crime of human trafficking for sexual purposes, and ordinary pandering and pimping”).

103. Letter from Coal. Against Trafficking in Women to Peter Keisler, Acting Attorney Gen., U.S. Dep’t of Justice (Oct. 5, 2007), available at <http://www.usdoj.gov/olp/pdf/catw-letter.pdf>.

these elements will only increase violence in international sex trafficking.¹⁰⁴

According to the Department of Justice, however, testimony regarding the use of coercion in sex trafficking is “not only attainable, but also a crucial component of successfully prosecuting human traffickers.”¹⁰⁵ If the coercion element is removed, there is no legal distinction between consent and force in the realm of commercial sex, and no woman can ever consent to sex when something of value is received in exchange. As a group of human rights, women’s rights, and immigrants’ rights groups stated, “Human trafficking, perhaps the most pernicious form of modern-day slavery, occurs when an individual extracts labor or sexual services from other individuals by depriving them of their free will.”¹⁰⁶ This is distinguished from other acts done of one’s own volition, as may be the case in prostitution. Furthermore, House Bill 3887 does not define the term “value” monetarily.¹⁰⁷ It is, therefore, unclear whether consensual sex that is done in pursuit of marriage, for pride, or simply for gratification would also violate this law.

Legal scholars also question the relocation of the trafficking offenses to the Mann Act in Title 18, which covers only prostitution claims, because it is confusing, incorrect, and ineffective.¹⁰⁸ Because the new sex trafficking offense would be moved to a completely different section of the United States Code, the two offenses of prostitution and sex trafficking

It is well documented that many victims enslaved by traffickers suffer from traumatic bonding and related conditions that make it impossible for them to give the testimony essential to the prosecution of fraud, force or coercion cases. In fact, we believe that the Department’s policy will cause predatory traffickers to *increase* their acts of violence and psychological abuse in order to ensure that the persons they abuse will not serve as prosecution witnesses.

Id. (emphasis in original).

104. *Id.*

105. Letter from Jennifer Korn, Dir., U.S. Dep’t of Justice Office of Intergovernmental and Pub. Liason, to Dorchon Leidholdt, President, Coal. Against Trafficking in Women-Int’l (Nov. 27, 2007), *available at* <http://www.usdoj.gov/olp/pdf/coalition-letter.pdf> (“As . . . results over the last six years have demonstrated, [the Department of Justice has] faced no problems convicting traffickers under the standards requiring proof of force, fraud, or coercion.”).

106. Letter from Alexandria House et al. to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary, et al. (Jan. 23, 2008), *available at* <http://www.usdoj.gov/olp/pdf/global-rights-tvpra-senate-letter012308.pdf>.

107. *See generally* H.R. 3887.

108. Letter from Alexandria House et al. to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary, et al. (Jan. 23, 2008), *available at* <http://www.usdoj.gov/olp/pdf/global-rights-tvpra-senate-letter012308.pdf> (“[T]he authors of H.R. 3887 were forced to rename the real sex trafficking offense in an unsuccessful attempt to reduce confusion.”). The letter goes on to state that “[t]hese stark changes to the statute are unnecessary and could undermine trafficking prosecutions.” *Id.*

become linked not only in phrasing, but in the way prostitution is conceptualized. When the original VTPA was conceived, Congress specifically did not place it near the Mann Act, but in a completely different chapter of the Code.¹⁰⁹ According to legal scholars, "Congress recognized that prostitution *per se* is not trafficking any more than farm labor or domestic work *per se* is trafficking . . . thus, moving the real sex trafficking crimes from the VTPA into the Mann Act is an ill-disguised attempt to recast all prostitution as trafficking."¹¹⁰ These laws are, therefore, not only discriminatory towards the women and men who participate in prostitution, but are also ineffective at combating sexual abuse of trafficked women.

The Department of Justice has also identified other problems with House Bill 3887 that do not relate to discrimination against prostitutes.¹¹¹ According to the Department, the current federal anti-trafficking laws should not be amended because state prostitution laws are sufficient, and a resulting federal anti-prostitution law would be a waste of resources.¹¹² The Department states that House Bill 3887 "would turn the FBI and CEOS into a national vice squad, at the expense of their current efforts to identify, rescue, and protect victims of all forms of child exploitation."¹¹³ Furthermore, the Fraternal Order of Police believe that "it is not clear, or even advisable, that the [f]ederal government become active on these local issues in the absence of evidence that the offenses were committed as part of or in furtherance of a human trafficking operation."¹¹⁴ The Na-

109. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered titles of U.S.C.).

110. Letter from Alexandria House et al. to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary, et al. (Jan. 23, 2008), available at <http://www.usdoj.gov/olp/pdf/global-rights-tvpra-senate-letter012308.pdf> (emphasis in original).

Congress should support the integrity of the comprehensive [VTPA] and not remove the real sex trafficking offense from the [VTPA], thereby ensuring that the fight against all 13th Amendment prohibitions on slavery, forced labor involuntary servitude and human trafficking will be prosecuted equally and with due regard for the heinous nature of these crimes.

Id.

111. See Press Release, U.S. Dep't of Justice, H.R. 3887 The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 as Passed by the House of Representatives on December 4, 2007 (Dec. 4, 2007), available at <http://www.usdoj.gov/01p/pdf/doj-position-on-hr3887.pdf>.

112. See *id.* ("These laws are rooted in the federal government's authority to enforce the Thirteenth Amendment's prohibition against involuntary servitude."). The Department of Justice makes clear that federal anti-trafficking laws are aimed at commercial sex induced by force or against an individual's will, not at prostitution generally. *Id.*

113. *Id.* (arguing that "[r]esources would inevitably be diverted away from one of DOJ's—and the Nation's—highest priorities").

114. Letter from Chuck Canterbury, Nat'l President, Fraternal Order of Police, to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary, and Arlen Specter, Ranking Member, Senate Comm. on the Judiciary (Dec. 6, 2007), available at <http://www.usdoj.gov/>

tional District Attorneys Association argued that “[f]ederalization of [prostitution offenses] is ill-advised as the crimes have minimal federal contact [and] would divert federal resources from human trafficking cases involving fraud, coercion or force, and unnecessarily involve all levels of government.”¹¹⁵ This ineffective use of money is a compelling argument against converting prostitution into a federal crime, particularly because it would neutralize the efforts against sex trafficking currently in force.

The original VTPA and its reauthorization in House Bill 3887 are overreaching and broad in both the generalization of prostitution as sex trafficking and the means by which prostitution is punished. The lack of distinction between prostitution and sex trafficking is a problem because it does not address the matter of choice, which is an important element of commercial sex that is essentially non-existent, in a legal sense, under these statutes.

That commercial sex is a legitimate form of work is not a new concept.¹¹⁶ This “pro-work view” of prostitution has existed as long as prostitution itself.¹¹⁷ As one legal scholar notes, this way of thinking about sex work allows for female sex workers to “[cast] off the shackles of patriarchy that would see prostitution as degrading, and finally [take] control of [their] own bodies.”¹¹⁸ In fact, those who espouse this view of prosti-

olp/pdf/fop-hr3887.pdf (stating that “[t]o do so is a waste of resources at all levels of government”).

115. Letter from James P. Fox, President, Nat’l Dist. Attorneys Ass’n, to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary, and Arlen Specter, Ranking Member, Senate Comm. on the Judiciary (Jan. 22, 2008), *available at* <http://www.usdoj.gov/olp/pdf/ndaa.pdf> (stating that “the proposed legislation would provide victim assistance services to those victims of ‘sex trafficking,’” which would “result in persons charged with state prostitution-related offenses being eligible for federal victim assistance services”). The National District Attorneys Association further argues that state and local governments have effectively and historically prosecuted prostitution-related crimes, since such crimes are local in nature. *Id.*

116. Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 350–51 (2006).

117. *Id.* (explaining the “individualist” and “pro-work” views of feminism in sex work). The “individualist” view calls for the establishment of individual rights of trafficked persons and opposes any definition of trafficking that does not account for the possibility of individual choice. *Id.* at 350. The “pro-work” view “proceeded from a view that prostitution, far from being the endpoint of a structure of degradation of women, was simply a form of wage labor.” *Id.* at 351.

118. *See id.* at 351 (“One justification for this view is the notion that anti-prostitution feminists simply ‘re-inscribe’ the victimization of women by ‘buying into’ the idea of prostitution as a form of degradation.”). The authors continues, “[R]ather than seeing it this way, the pro-work view would seek to dismantle all the ways in which women are placed apart from men, by resisting the impulse to see kinds of work in which women are predominant as special for that reason.” *Id.*

tution call for a statutory distinction between prostitution and sex trafficking.¹¹⁹ Others argue that “[j]ust as one cannot legally consent to one’s own enslavement, consent could not be a basis for validating commercial sex or ‘female sexual slavery.’”¹²⁰ Yet the latter view does not address the issue at hand: that a woman who is paid to have sex is considered automatically enslaved, unable to consent to anything that is happening to her own body. This view only propels the idea that women are commodities, rather than the idea that women may perform sexual acts to which they consent as participants in an exchange of services. To say that all women who sell sex are enslaved only perpetuates the objectification of women instead of defying it by acknowledging the choice involved in a woman’s sexual activities.

B. Strengthening Prostitution Laws Would Exacerbate the Existing Discrimination Present in State Prostitution Laws and Enforcement

The wording of many prostitution bills has historically been discriminatory.¹²¹ For example, an Alaskan prostitution law that defined prostitution as “the giving or receiving of the body by a female for sexual intercourse for hire has been held unconstitutional” because it limited prostitution to the female body alone.¹²² Another example is an Alabama law, stating that no “female shall prostitute herself or use indecent” behavior to induce another person into sexual intercourse, which was also held unconstitutional.¹²³ Despite steps that have been taken to reword these statutes, courts and legislators still generally accept several rulings in state courts still in effect today (some over sixty years old) that have deemed constitutional even blatantly discriminatory laws.¹²⁴ As recently

119. See *id.* (“Individualists called for a definition of sex trafficking that explicitly described it as commercial sex involving coercion.” (emphasis omitted)). A definition set up in this manner would leave room for the interpretation that commercial sex may also be uncoerced. *Id.*

120. See *id.* (describing “structuralists,” who believe that the definition of sex trafficking should include any form of commercial sex because of the necessarily coercive nature of commercial sex). “The structuralist proposal also called for an explicit statement disregarding any manifestation of apparent consent by the trafficking victim.” *Id.*

121. See Kate Decou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 429 (1998).

122. 63C AM. JUR. 2D *Prostitution* § 6 (2009) “[T]here has been increasing recognition in recent years that prostitution statutes may be unconstitutional on their face, or as applied, because they discriminate against women.”

123. *Id.* (stating that this law was “vague and overbroad, in that it penalized only females”).

124. See *id.* (explaining that, among other things, female pronouns used in most prostitution laws did not constitute gender discrimination).

as May 2009, it has been widely accepted that “the practice by a female of indiscriminate sexual intercourse with males for compensation” does not deny equal protection to women because “[legislatures are] constitutionally free to exclude male prostitution from the coverage of legislation on the basis that it does not constitute a social problem.”¹²⁵

This understanding of the law is problematic for several reasons. First, the standard that determines a “social problem” is a subjective one. It still allows for existing gender bias and, without any constitutional safeguards to check gender discrimination, this standard is also open to sexual discrimination. Second, this interpretation allows for preexisting gender bias to remain authoritative, even if society’s standards have evolved. For example, it is still acceptable in Louisiana that “a man practicing indiscriminate sexual intercourse with women for compensation does not commit [a] crime,” while a woman who does the same may be punished.¹²⁶ The Louisiana Supreme Court stated, “Discrimination between the sexes falls within the prohibition that states must accord equal protection to those within [their jurisdiction]. However, in matters in which sex is a material factor, a statute may make a distinction without violating the constitutional guarantee if the classification is a natural and reasonable one.”¹²⁷ In this case, any crime based on the act of sex may reasonably distinguish between men and women.¹²⁸ Finally, the reasoning that male prostitution may not be a “social problem” in and of itself promotes gender discrimination by exempting men from punishment for the same behavior that is considered offensive and punishable for women.

Another problem present in nationwide state prostitution laws is the fact that discriminatory enforcement is considered constitutional, despite

125. See *State v. Devall*, 302 So. 2d 909, 912–13 (La. 1974); see also 63C. AM. JUR. 2D *Prostitution* § 6 (2009) (describing legislative reasoning for the non-violation of state equal protection laws). Prohibiting the solicitation of women for prostitution is not gender-discriminatory because such conduct would have been prohibited whether the solicitation was aimed at a male or a female. 63C. AM. JUR. 2D *Prostitution* § 6 (2009). Furthermore, the imposition of greater penalties assessed to prostitutes, rather than to solicitors, to greater penalties for those who sell drugs, rather than just use them. *Id.*

126. *Devall*, 302 So. 2d at 910 (discussing the constitutionality of Louisiana’s prostitution laws). The law on prostitution in Louisiana has since changed its wording from “woman” to “person,” but *Devall* is still applicable case law and has not been overturned. LA. REV. STAT. ANN. § 14:82(A)(1) (2008).

127. *Devall*, 302 So. 2d at 911 (citing *Goesaert v. Cleary*, 335 U.S. 464, 475 (1948)) (following *Goesaert*’s mandate that women who take part in men’s vices are considered equal in prosecution for their vices, but adding that crimes involving sex subject men and women to different treatment due to their different natures).

128. See *id.* (“When an activity by women may, in the allowable legislative judgment, give rise to moral and social problems against which it should devise deterrents, the legislature may enact laws to accomplish such a purpose.”).

massive inequality in policies that allow female prostitutes to be arrested more frequently than male prostitutes.¹²⁹ It is still the law that the high prosecution rate for women for violating prostitution statutes, as compared to that of men, does not mean that police embark on a "systematic program . . . of discriminatory enforcement."¹³⁰ In a case from Washington, the state appeals court found that, even though almost every person arrested for prostitution was a woman and only males were on the police force, these facts were insufficient to show discriminatory treatment of female prostitutes.¹³¹ Similarly, the fact that a police department systematically sent more men as decoys, resulting in a higher arrest rate for female prostitutes than for male customers, was not considered discriminatory in a case out of California.¹³² Moreover, many police officers focus their attention on streetwalkers, rather than on women who practice in brothels, using a method known as the "street sweep."¹³³ One

129. 63C AM. JUR. 2D *Prostitution* § 6 (2009) (explaining that, while some courts have held that prosecuting only women in prostitution offenses is a denial of equal protection rights, other courts have found this practice constitutional).

130. *Id.* (citing *In re Elizabeth G.*, 126 Cal. Rptr. 118, 122 (Cal. Ct. App. 1975)) (arguing that, in three successive years, "the percentage of females arrested for violating a statute which prohibits anyone to solicit or engage in any act of prostitution constituted 95.5 percent, 98.2 percent, and 72.7 percent of all those arrested" does not mean that the police were deliberately attempting to arrest women).

131. *Id.* (citing *City of Yakima v. Johnson*, 553 P.2d 1104, 1106 (Wash. Ct. App. 1977)). *City of Yakima* states that even though "virtually no men have been arrested and that only male police officers were assigned to enforcing" the prostitution law, there was no showing of discrimination. *City of Yakima*, 553 P.2d at 1106. The court provided the following statistics:

The number of males and females arrested for prostitution over a 10-year period was as follows: 1974, 67 females, 1 male; 1973, 58 females, 1 male; 1972, 34 females, 3 males; 1971, 31 females, 4 males; 1970, 41 females, 1 male; 1969, 42 females, 4 males; 1968, 23 females, 1 male; 1967, 9 females, no males; 1966, 3 females, no males; 1965, 3 females, no males; 1964, 1 female, no males.

Id. at n.3.

132. *People v. Superior Court (Hartway)*, 562 P.2d 1315, 1321 (Cal. 1977). The court justified its decision by stating:

[Sixty] percent of the time allotted to prostitution is devoted to investigating pimps, panderers, and bar, restaurant, motel and hotel proprietors . . . [and] . . . [p]rostitutes, males and female receive 30 percent of the unit's attention and customers are the subject of the remaining 10 percent. Because 95 percent of the pimps, etc., are male, as are 10 percent of the prostitutes and all of the customers, it is clear that the vice control unit devotes at least half of its resources to prosecuting men.

Id. One of the reasons for not using female decoys as often as males is that doing so would be "twice as 'expensive' as using males because an additional officer is required under current practice to ensure the female's safety." *Id.*

133. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 436 (1998) ("These sweeps are random and often politically motivated."). Street sweeps are lawful, thanks to vague ordinances

particular example of a street sweep took place in Detroit, where police arrested women whom they knew to have past records and reputations for prostitution.¹³⁴

Furthermore, the vast majority of women who are incarcerated for streetwalking are women of color.¹³⁵ Though the majority of prostitutes do not work on the street, those that do account for ninety percent of the arrests made and, though only forty-five percent of the prostitutes working on the streets are members of a minority ethnicity, women of color account for eighty-five percent of those incarcerated nationwide.¹³⁶ From 1985 to 2000, there was “a 273% increase of women inmates.”¹³⁷ These numbers are problematic because they also display a difference in treatment between minority women and Caucasian women. Unfortunately, “[p]rostitutes fare no better while in prison,” than they do outside of it.¹³⁸ Prostitutes are frequently not offered rehabilitation services, and, therefore, the rate of recidivism for female prostitutes is high.¹³⁹ Prison healthcare systems are also frequently unable to provide gynecological services, which keeps female inmates from obtaining proper care for venereal diseases.¹⁴⁰

prohibiting “vagrancy, disorderly conduct and loitering,” which allow police to sweep known soliciting areas and arrest anyone who, in the officer’s opinion, is in violation of such ambiguous ordinances. RICHARD SYMANSKI, *THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES* 90 (1981).

134. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 427, 436 (1998) (“Numerous other examples of this sweep practice exist in the present day.”). Prostitution as a criminal act is arbitrarily enforced, as illustrated by “[t]he random nature of arrests, uneven types of charges, and vague interpretations of laws.” *Id.*

135. Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 *SUFFOLK U. L. REV.* 235, 244 (2000) (“The effect of such enforcement patterns on the already acute racial tensions of America’s inner cities can only be surmised.”). This problem is compounded by the fact that incarcerated prostitutes are often subjected to harsher treatment in prison. *Id.*

136. *Id.*

137. *Id.* (discussing the impact of prostitution laws on the prison population). Furthermore, in the year 2000, “over 30% of women serving time in local jails have been arrested for prostitution related offenses.” *Id.* In addition, female prostitution convictions affect both state and federal prisons because those who abuse drugs will often prostitute themselves to support their habits. *Id.*

138. *Id.* at 245 (“The criminalization of prostitution has marginalized the prostitute within the community. The stigma attached to the profession often prevents the prostitute from gaining legitimate employment, forcing him or her to depend solely on illegitimate markets for drugs and sex.”).

139. *Id.* (showing that this fact is “[d]ue primarily to the sudden increase of women inmates”).

140. Charles Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 *SUFFOLK U. L. REV.* 235, 245 (2000) (noting that, historically, prison healthcare services were designed with the needs of men in mind). “In legislating sexual

Without judicial condemnation of discriminatory law enforcement practices, female prostitutes will continue to be incarcerated at disproportionately high rates. Equal protection exists so that all people in similar circumstances may be treated alike under the law.¹⁴¹ When women are systematically investigated and arrested for prostitution, while their male customers are widely tolerated and escape penalties, this well-established and fundamental right is undermined. The fact that courts are still able to apply this outdated and discriminatory case law emphasizes the problem with making the penalties for these crimes even stricter. These policies clearly demonstrate that women are punished more often than men for the offense of prostitution. The discriminatory treatment of female prostitutes in both the wording and enforcement of state prostitution laws and state case law is a hurdle that has yet to be overcome. This issue is exacerbated by the fact that these laws are strengthened by the VTVPA in order to combat sex trafficking. Because the law's understanding of women's role in prostitution and in society in general is still vastly discriminatory, these laws should not be broadened and strengthened by the proposed amendments to the VTVPA.

C. *Decriminalizing Prostitution Could Aid Enforcement of Sex Trafficking*

Currently, almost all states criminalize prostitution.¹⁴² There are, however, a few exceptions to this generalization. The first is Rhode Island,

mores, the United States succeeded in increasing the number of women behind bars while making it more difficult to combat the health problems associated with prostitution." *Id.*

141. *See Reed v. Reed*, 404 U.S. 71, 75-76 (1971) ("The Equal Protection Clause of [the Fourteenth Amendment]. . . [denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."). Such a classification is permissible only when it is reasonable and not arbitrary and must be based on some ground of difference that relates to the goal of the legislation in order to assure that people in similar circumstances are treated equally. *Id.* at 76.

142. ALA. CODE § 13A-12-121 (2008); ALASKA STAT. § 11.66.100 (2008); ARIZ. REV. STAT. ANN. § 13-3214 (2008); ARK. CODE ANN. § 5-70-102 (2008); CAL. PENAL CODE § 653.22 (West 2008); COLO. REV. STAT. § 18-7-201 (2008); CONN. GEN. STAT. § 53a-82 (2008); DEL. CODE ANN. tit. 11, § 1342 (2008); D.C. CODE § 22-2701 (2008); FLA. STAT. § 796.07 (2008); GA. CODE ANN. § 16-6-9 (2008); HAW. REV. STAT. § 712-1200 (2008); IDAHO CODE ANN § 18-5613 (2008); 720 ILL. COMP. STAT. 5/11-14 (2008); IND. CODE § 35-45-4-2 (2008); IOWA CODE § 725.1 (2008); KAN. STAT. ANN. § 21-3512 (2008); KY. REV. STAT. ANN. § 529.020 (West 2008); LA. REV. STAT. ANN. § 14:82 (2008); ME. REV. STAT. ANN. tit. 17-A, § 853-A (2008); MD. CODE ANN., CRIM. LAW § 11-306 (West 2008); MASS. GEN. LAWS ch. 272, § 2 (West 2008); MICH. COMP. LAWS § 750.449 (2008); MINN. STAT. § 609.3243 (2008); MISS. CODE ANN. § 97-29-49 (2008); MO. REV. STAT. § 567.020 (2008); MONT. CODE ANN. § 45-5-601 (2008); NEB. REV. STAT. § 28-801 (2008); NEV. REV. STAT. § 201.354 (2008); N.H. REV. STAT. ANN. § 645:2 (2008); N.J. STAT. ANN. § 2C: 34-1 (West

which currently allows prostitution in a private setting between two consenting adults.¹⁴³ In fact, this law was changed in 1980 from banning all prostitution, due in large part to a group that still advocates for prostitutes' rights, called Call Off Your Old Tired Ethics, or COYOTE.¹⁴⁴ COYOTE worked to amend the Rhode Island law on prostitution because it "[swept] too broadly" and did not take into account any "private consensual conduct between adults and private solicitation."¹⁴⁵ The law was rephrased so as to not generally punish all forms of sex for monetary gain.¹⁴⁶ Two new anti-prostitution bills, however, are currently being considered in the Rhode Island legislature.¹⁴⁷ One bill, introduced in January of 2009 in the Rhode Island House of Representatives, would completely criminalize prostitution in the state,¹⁴⁸ and the other, introduced in February in the state senate, would go even further by penalizing property owners who permit prostitution on their property.¹⁴⁹ While

2008); N.M. STAT. § 30-9-2 (2008); N.Y. PENAL LAW § 230.00 (Consol. 2008); N.C. GEN. STAT. § 14-204 (2008); N.D. CENT. CODE § 12.1-29-03 (2008); OHIO REV. CODE ANN. § 2907.21 (West 2008); OKLA. STAT. tit. 21, § 1029 (2008); OR. REV. STAT. § 167.007 (2008); 18 PA. CONS. STAT. § 5902 (2008); R.I. GEN. LAWS § 11-34-8 (2008); S.C. CODE ANN. § 16-15-90 (2008); S.D. CODIFIED LAWS § 22-23-§22-23-1 (2008); TENN. CODE ANN. § 39-13-513 (2008); TEX. PENAL CODE ANN. § 43.02 (Vernon 2008); UTAH CODE ANN. § 76-10-1302 (2008); VT. STAT. ANN. tit. 13, § 2632 (2008); VA. CODE ANN. § 18.2-46 (2008); WASH. REV. CODE § 9A.88.030 (2008); W. VA. CODE § 61-8-5 (2008); WIS. STAT. § 944.30 (2008); WYO. STAT. ANN. § 6-4-101 (2008).

143. See R.I. GEN. LAWS § 11-34-8 (2008).

144. *COYOTE v. Roberts*, 502 F. Supp. 1342, 1344 (D.R.I. 1980) (ending the ban on all forms of prostitution in Rhode Island). "COYOTE [is] a national organization of women and men (both prostitutes and nonprostitutes) who seek reform of law prohibiting prostitution and other forms of sexual behavior." *Id.*

145. *Id.* at 1347 (pointing out that the statute was aimed at suppressing prostitution for pecuniary gain). COYOTE's main claim "was that the State could not constitutionally bar consenting adults from engaging in purely private sexual activity, irrespective of whether the motivation of one of the participants was economic." *Id.* at 1348.

146. *Id.* at 1347 n.4.

147. Lynn Arditi, *Still No Decision on R.I. Anti-Prostitution Legislation*, PROVIDENCE J. BULL., June 28, 2009, at A, available at 2009 WLNR 12357353 (discussing the pending legislation).

148. H.R. 5044, 2009 Gen. Assem., Jan. Sess. (R.I. 2009), available at <http://www.rilin.state.ri.us/BillText09/Housetext09/H5044Aaa.pdf> (providing that a first-time prostitution offender may receive up to six months imprisonment and up to a one thousand dollar fine).

149. S. 0596, 2009 Gen. Assem., Jan. Sess. (R.I. 2009), available at <http://www.rilin.state.ri.us/BillText09/Housetext09/H5044Aaa.pdf>.

each house overwhelming passed its respective bill,¹⁵⁰ there has been vocal opposition in the state to these bills becoming law.¹⁵¹

Nevada currently allows prostitution in some forms and criminalizes it in others.¹⁵² There have been varying degrees of success and much debate over whether or not this system of state licensing has been beneficial for the prostitutes.¹⁵³ One legal scholar notes, "Licensed prostitutes in Nevada appear to gain little by the limited governmental permission to engage in prostitution and suffer almost all of the disadvantages of being an exploited worker in a capitalist society."¹⁵⁴ Decriminalizing prostitution would permit sex workers to unionize and get the same benefits as other workers, but this is unrealistic because those who work as prostitutes are still subject to unusually harsh demands.¹⁵⁵ The status of prostitutes as low-level workers, however, is arguably better than their potential status as criminals who may be imprisoned for their work.

Opponents of the decriminalization of prostitution argue that it will aid or impede laws that criminalize sex trafficking.¹⁵⁶ In the fall of 2008, citizens of San Francisco voted on a proposition that would decriminalize

150. Lynn Arditi, *Still No Decision on R.I. Anti-Prostitution Legislation*, PROVIDENCE J. BULL., June 28, 2009, at A, available at 2009 WLNR 12357353 (reporting that the Senate bill passed by a vote of 35-0, and the house bill passed by a vote of 68-2).

151. *Id.* (noting opposition to the bill from the American Civil Liberties Union (ACLU) and the Rhode Island affiliate of the National Organization for Women (NOW)).

152. NEV. REV. STAT. §§ 201.354, 201.360, 244.345 (2008) (stating that prostitution is allowed in a licensed brothel, and any coercion of a prostitute into entering into a house of prostitution is a felony, as well as requiring those who wish to be involved in an escort service to acquire the correct license and file an application with a fee).

153. Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 96 (1998) (explaining that the Nevada prostitution laws fail to satisfy both those who believe that prostitution is exploitation and those who believe that prostitution should be practiced freely). Bingham explains that Nevada only allows for very highly regulated prostitution, but there is far less freedom involved. *Id.* The fact that women prostitutes in Nevada are still treated like lower-class workers, she argues, diminishes the idea that legalizing prostitution is the solution that many supporters would like it to be. *Id.*

154. *Id.* (arguing that prostitutes in Nevada "earn a meager living" compared to other workers because they have to pay out-of-pocket for room and board, maid services, supplies, mandatory tipping, and laundering services). Furthermore, Bingham states that prostitutes cannot collect unemployment when fired and must submit to physical examinations in order to protect the customers, not themselves. *Id.*

155. *Id.* ("A prostitute, unlike a McDonald's cashier or a waitress, is essentially a prisoner in a brothel for a three-week shift and cannot collect unemployment insurance if she is fired."). Bingham states that "prostitutes do not earn an adequate income even though prostitution, in a limited sense, is condoned by the government." *Id.*

156. John R. Miller, Op-Ed., *The Justice Department, Blind to Slavery*, N.Y. TIMES, July 11, 2008, at A17, available at 2008 WLNR 12997772 ("I have talked with survivors all over the world, including the United States, and I share the view that these women and girls — the average age of entry into prostitution is 14 — are not participating in the 'oldest profession' but in the oldest form of abuse. They are slaves.").

prostitution entirely.¹⁵⁷ This proposed act was drafted by the Erotic Service Providers Union.¹⁵⁸ Known as Proposition K, the act would eliminate penalties for prostitutes and suspend government funding for any law enforcement investigation using racial profiling. The proposal reads, in part:

Proposition K would prohibit the Police Department from providing resources to investigate and prosecute prostitution. It would also prohibit the Police Department from applying for federal or state funds that involve racial profiling to target alleged trafficking victims and would require any existing funds to implement the Task Force's recommendations.

Proposition K would require the Police Department and the District Attorney to enforce existing criminal laws that prohibit coercion, extortion, battery, rape, sexual assault and other violent crimes, regardless of the victim's status as a sex worker. It also requires these agencies to fully disclose the investigation and prosecution of violent crimes against sex workers.¹⁵⁹

Proposition K was endorsed by the San Francisco Democratic Party,¹⁶⁰ as well as by the San Francisco Bar Association.¹⁶¹ The San Francisco Bar Association stated that the proposition should be passed because it would reduce sex trafficking, as the measure provided "a lawful environment for the sexual service industry, shifting enforcement resources to

157. Evelyn Nieves, *With Proposition K, San Francisco Considers Decriminalizing Prostitution*, THE HUFFINGTON POST, Oct. 21, 2008, http://www.huffingtonpost.com/2008/10/21/with-proposition-k-san-fr_n_136634.html ("San Francisco would become the first major U.S. city to decriminalize prostitution if voters next month approve Proposition K[,] a measure that forbids local authorities from investigating, arresting or prosecuting anyone for selling sex.").

158. Bernice Yeung, *Prop. K: Untested Theories Drive Prostitution Debate*, NEWSDESK, Oct. 20, 2008, <http://www.newsdesk.org/archives/005723.html> ("Drafted by the Erotic Service Providers Union (ESPU), a local sex workers' alliance, Proposition K would require San Francisco law enforcement to disregard state laws prohibiting prostitution."). The proposition also calls for the re-allocation of government money spent on arrests related to prostitution to be shifted to other crimes, which includes crimes involving violence against prostitutes. *Id.* "[T]he dialogue surrounding the proposition reflects the increasing globalization of the sex industry." *Id.*

159. Yes on Prop K, Ballot Pamphlet Summary—San Francisco 2008, http://www.yesonpropk.org/ProstitutionInit_SF08.html (last visited June 30, 2008) (summarizing the text of the proposition as it would appear on the ballot).

160. *Id.* (listing the organizations that officially endorsed Proposition K).

161. DAVID MICHAEL BIGEISEN, BAR ASSOCIATION OF SAN FRANCISCO, RESOLUTION 03-07-2007 (2008), http://www.aplehawaii.org/Resources_For_Prost_Law/Model_Prost_Laws/Cal_BAR_Assn-Decrim_Resolution.pdf (endorsing Proposition K in order to "decriminalize prostitution and foster safer sex practices").

actual incidences of abuse rather than consensual commercial sex in general.”¹⁶² The Association also argued that the illegal status of prostitutes negatively impacts their health and safety by “mak[ing] it easier for predators to commit acts of violence against prostitutes including human sex trafficking.”¹⁶³ This sentiment is echoed by experts who combat sex trafficking.¹⁶⁴ According to Marjan Wijers, an “[i]ndependent researcher on human rights and human trafficking” who has worked against sex trafficking on an international level, Proposition K would “substantially contribute to the effective combat of trafficking” for several reasons.¹⁶⁵ First, by eliminating the risk that involuntary prostitutes will face criminal penalties for reporting their abuse to police, the act would reduce the marginalization of men and women who are forced into the sex industry.¹⁶⁶ Second, prostitutes who do not trust the police will feel more at ease reporting coercion into trafficking because they will feel as though they are being taken seriously by law enforcement officials.¹⁶⁷ Third, any racial profiling would not help combat international sex trafficking because many of the victims of trafficking come from all parts of the world,

162. *Id.* (reflecting the Resolutions Committee’s recommendation to “approve in principle”). The Bar Association of San Francisco agreed that this resolution should be adopted for various reasons including the positive effects it would have on prosecuting sex traffickers. *Id.* The Bar Association states:

Regulation of prostitution would also reduce violence and other associated criminal behavior. Because illegal prostitution occurs underground without regulation, prostitutes are at increased risk of violent attacks from both customers and those who engage in other criminal activities generally associated with illegal prostitution. Decriminalization will separate sexual behavior from these and other illegal activities.

Id.

163. *Id.* (arguing that public health has been positively impacted by the decriminalization of prostitution and the regulation of safe-sex practices). “A 1993 study found no reported cases of prostitution-related HIV/AIDS in Nevada, where brothels may be licensed in certain counties.” *Id.*

164. *E.g.*, Marjan Wijers, *Prop K to Suppress Trafficking and Prevent Child Prostitution*, YESONPROP K, Aug. 17, 2008, <http://www.yesonpropk.org/Wijers.html>.

165. *Id.*

166. *Id.* (“The criminalization and prosecution of prostitutes feeds into this fear, and in doing so benefits the traffickers while deterring the victims to report the crime.”). Additionally, legal stigmatization and marginalization of prostitutes compounds their vulnerability to violence, abuse, and trafficking. *Id.*

167. *Id.* (“[B]ecause of their status of prostitutes, most victims of trafficking do not trust the police and have no confidence that their complaint will be taken seriously and their violators will be prosecuted, no matter if they were coerced into prostitution or knew [beforehand] they would work as prostitutes.”).

including the United States.¹⁶⁸ And finally, decriminalizing prostitution would help prevent child prostitution.¹⁶⁹

One very important element of Proposition K is that it forbids the use of federal and state funding to pursue sex traffickers by racially profiling.¹⁷⁰ This provision was included in response to the prevalence of local law enforcement raids on Asian-owned massage parlors in San Francisco.¹⁷¹ In support of the proposition, the California Office of the Public Defender stated that the measure's provision on racial profiling would not limit or interfere with the "investigation into and prosecution of human trafficking."¹⁷² In fact, Public Defender Jeff Adachi stated that "[s]ince the passage of the California Trafficking and Victims Protection Act, [he was] not aware of any prosecutions for human trafficking under this section" and that Proposition K "would not prohibit local law enforcement from enforcing federal law to combat the exploitation of persons who are kidnapped, transported, abused and held captive by sex traffickers."¹⁷³

Opponents of Proposition K believe that decriminalizing prostitution would give the police fewer legal tools for combating sex trafficking.¹⁷⁴ The District Attorney of San Francisco argued that decriminalizing prostitution would not benefit workers' conditions because prostitution is an

168. *Id.* ("On the contrary, it might divert attention from certain groups of trafficking victims who do not fit the presumptions underlying the concept of racial profiling.").

169. Marjan Wijers, *Prop K to Suppress Trafficking and Prevent Child Prostitution*, YESONPROPK, Aug. 17, 2008, <http://www.yesonpropk.org/Wijers.html> ("[Decriminalizing] prostitution creates the conditions for regulating the industry and the application of health and safety standards.").

170. Yes on PropK, Ballot Pamphlet Summary—San Francisco 2008, http://www.yesonpropk.org/ProstitutionInit_SF08.html (last visited July 30, 2009).

171. Evelyn Nieves, *With Proposition K, San Francisco Considers Decriminalizing Prostitution*, THE HUFFINGTON POST, Oct. 21, 2008, http://www.huffingtonpost.com/2008/10/21/with-proposition-k-san-fr_n_136634.html.

172. Letter from Jeff Adachi, Pub. Defender, City and County of S.F., to John Arntz, Dir., Elections, Ballot Simplification Comm., Dep't of Elections (July 25, 2008), available at http://www.sfgov.org/site/uploadedfiles/election/Meeting_Information/BSC/Pub%20Def%20Analysis%20of%20Prostitution%20Measure.pdf (explaining the stance of the San Francisco Public Defender's Office in support of Proposition K).

173. *Id.* (stating that there is "no reason why prohibiting the receipt of . . . [funding conditioned upon the use of racial profiling] . . . would limit or interfere with the investigation into and prosecution of human trafficking").

174. No on K, <http://www.noonk.net/> (last visited June 24, 2009) (claiming that Proposition K will ultimately hurt women, children, and the community because it advocates for the non-enforcement of California's prostitution laws). "Non-enforcement of these laws would put all of us at risk, and send an invitation out to pimps, traffickers, and johns." *Id.*

inherently violent and undesirable act.¹⁷⁵ But the passage of an act decriminalizing prostitution would not hinder enforcement of sex trafficking laws. Yet it is still unknown how continuing to criminalize prostitution addresses the issue of women sex workers who choose sex work as an occupation, rather than those who are coerced into commercial sex acts. Furthermore, decriminalization of prostitution could benefit women who are forced into the industry by encouraging them to go to law enforcement for help.¹⁷⁶

Proposition K calls for enforcement against those who force women into prostitution without their consent as well as against those who allow prostitution by children under the age of sixteen.¹⁷⁷ This approach positively impacts the goals of sex trafficking laws because it promotes stronger penalties and punishments for those who commit these crimes. Without distinguishing adult, consenting women who choose prostitution as a career from those who are forced into the profession, or from children who are legally unable to consent, the argument against this proposition is inherently gender-biased because it essentially concludes that women are unable to consent to sex. Proponents of Proposition K argue that it would contribute to eradicating human trafficking in places in which prostitution is not criminal. Proposition K did not pass, but was supported by forty-one percent of the voters, totaling 140,173 votes in one city.¹⁷⁸

The arguments in support of Proposition K highlighted the potential of decriminalizing prostitution. While this Comment does not advocate decriminalizing prostitution, it is important to consider the large amount of people who are in favor of decriminalization.¹⁷⁹ Decriminalization is a

175. Evelyn Nieves, *With Proposition K, San Francisco Considers Decriminalizing Prostitution*, HUFFINGTON POST, Oct. 21, 2008, http://www.huffingtonpost.com/2008/10/21/with-proposition-k-san-fr_n_136634.html (quoting Kamala Harris, District Attorney of San Francisco, as saying that this ballot “mistakenly assumes prostitution is a victimless crime”).

176. See Jesse McKinley, *San Francisco's Prostitutes Support a Proposition*, N.Y. TIMES, Nov. 1, 2008, at A10, available at <http://nytimes.com/2008/11/01/us/01proposition.html>.

177. Yes on Prop K, Ballot Pamphlet Summary—San Francisco 2008, http://www.yesonpropk.org/prostitutionalnit_SF08.html (last visited July 30, 2009) (citing the text of Proposition K as it appeared on the ballot initiative). The pertinent part of the text says that “Proposition K would require the Police Department and the District Attorney to enforce existing criminal laws that prohibit coercion, extortion, battery, rape, sexual assault and other violent crimes, regardless of the victim’s status as a sex worker.” *Id.* This proposition, in conjunction with the United States Code provision prohibiting coercion and underage sex work, means that Proposition K would reinforce these statutes. See *id.*; see also 18 U.S.C. § 1591 (2008).

178. Yes on Prop K, <http://www.yesonpropk.org/> (last visited June 30, 2009).

179. *Id.*

viable option that emphasizes the schism between what citizens believe about prostitution and the way in which the law defines it.

IV. CONCLUSION

When Congress introduced the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, it was an attempt to turn prostitution into a federal crime.¹⁸⁰ The massive amount of criticism the bill received may have influenced the passage of the second bill, which did not introduce the additional offenses that were the source of the controversy over House Bill 3887. The fact that the second bill stalled in the Senate, however, may be evidence that the argument was not quite over. Because the reauthorization for both of these bills began in 2008 and will extend only until 2011, it is possible that Congress wanted to expedite the bill's passage in order to receive proper funding by the end of 2008 and thus, introduced the third bill, House Bill 7311, without the controversial language contained within it. Yet because the VTPA has been reauthorized at intervals, it will most likely continue after 2011. It is important that the additional offenses that were introduced with House Bill 3887 are not ignored, as this could become an issue that will recur in a few years. The equation of prostitution and sex trafficking, in addition to the wording of the VTPA already passed in 2000, would be unacceptable for several reasons.

First, both the VTPA and the reauthorization bill that passed through the House in 2007 too broadly generalize and punish prostitutes. In the original act, the congressional findings of the VTPA asserted that the commercial sex industry contributes to sex trafficking without providing any statistics in support of this claim.¹⁸¹ Because Congress has not presented concrete evidence that prostitution aids and contributes to sex trafficking, it is not logical to include this statement in the congressional findings, essentially skewing the way the rest of the bill is understood. Furthermore, House Bill 3887 would have made a new offense out of

180. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (1st Sess. 2007).

181. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(2), 114 Stat. 1464, 1466 (codified at 22 U.S.C. § 7101(b)(2)) ("The sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services."). This section of the act ends here, with no statistics or findings to support this claim. *Id.* The act goes on to state that "[t]rafficking in persons is not limited to the sex industry," but that the "seriousness of this crime and its components is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers." *Id.* §§ 102(b)(3), (15) (emphasis added).

prostitution under the title of “sex trafficking,” which would equate prostitution with coerced sex.

Second, prostitution laws that are currently in place in the states are discriminatory and will only be augmented by federalizing the offense. These laws are enforced in an unequal way and are discriminatory in their wording. Turning these acts into federal crimes would only strengthen the pre-existing discrimination against women that is present in state laws.

Lastly, not only is strengthening existing prostitution laws inadvisable, but decriminalizing prostitution has been, in some places, been effective against sex trafficking.¹⁸² Federalizing a law that condemns the practice may actually foil the efforts of anti-sex trafficking work, as evidenced by the fact that the decriminalization of prostitution has benefited efforts to reduce sex trafficking and abuse in other countries.¹⁸³ In Sweden, where prostitution is legal, the number of prostitutes who solicited themselves on the street fell by forty percent within the first four years after prostitution was decriminalized.¹⁸⁴ Furthermore, officials in Sweden have stated that decriminalization laws “have made their country a bad destination for traffickers.”¹⁸⁵ In New Zealand, which decriminalized prostitution in 2003, “[m]ore than 60% of prostitutes felt they had more power to refuse clients than they did before.”¹⁸⁶ A study conducted in May 2007 reported that, in New Zealand, “only about 1% of women in the business were under the legal age of 18” and that “only 4% said they had been pressured into working by someone else.”¹⁸⁷ In fact, prostitutes in New Zealand are said to “feel better protected by the law and much more able to stand up to clients and pushy brothel operators.”¹⁸⁸ While Proposition K, which would have legalized prostitution in San Francisco, did not pass, the measure was supported by almost forty-two percent of the voters, a

182. See *Policing Prostitution: The Oldest Conundrum*, ECONOMIST, Oct. 30, 2008, available at http://www.economist.com/world/international/displaystory.cfm?story_id=12516582&fsrc=rss (discussing the success of legalized prostitution in New Zealand).

183. *Id.*

184. *Id.* (explaining that anti-prostitution laws “[make] life dangerous for those who ply their trade secretly”). The article goes on to discuss how “[a] life of dodging between apartments and exchanging furtive texts can leave women more reliant on pimps.” *Id.*

185. *Id.*

186. *Id.*

187. *Policing Prostitution: The Oldest Conundrum*, ECONOMIST, Oct. 30, 2008, available at http://www.economist.com/world/international/displaystory.cfm?story_id=12516582&fsrc=rss.

188. *Id.* (quoting Catherine Healy, head of the New Zealand Prostitutes Collective). When brothel operators no longer have one hundred percent control of commercial sex, the women who work for them have more personal freedom. *Id.*

sizable amount of the electorate.¹⁸⁹ Strengthening laws against prostitution would isolate these voters.

The fact that the original House Bill 3887 only passed in the House does not necessarily indicate that the efforts to create a new act are no longer an issue. Even after the Senate introduced a new bill that included only the new offense of “sex tourism” without the new “sex trafficking” offense, the debate over the Department of Justice’s arguments against House Bill 3887 continued.¹⁹⁰ A subsequent bill that adopts the language of the resolution preceding it generally means that the previous bill has been abandoned, but does not mean that the language of the first bill will not come back the next time the act is to be reauthorized. It is important that this issue is addressed so that Congress does not back-door any new legislation via subsequent VTVPA reauthorizations.

There is no dispute that sex trafficking is morally wrong and a problem on an international and domestic level. The United Nations has provided a framework to understand human trafficking by defining sex trafficking as “the recruitment, transportation, transfer, [harboring] or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”¹⁹¹ As such, sex trafficking has tremendous effects on a global scale. Every year, between 700,000 and 900,000 men, women, and children are trafficked across international borders, generating profit for traffickers somewhere between seven and ten billion dollars each year.¹⁹² It is important that the United States takes steps to

189. Yes on Prop K, <http://www.yesonpropk.org/> (last visited June 24, 2009).

190. Kenneth Franzblau, Letter to the Editor, *The Justice Department and Sex Trafficking*, N.Y. TIMES, July 23, 2008, available at 2008 WLNR 13700585; see also Ronald Weitzer, *The Justice Department and Sex Trafficking*, N.Y. TIMES, July 23, 2008, available at 2008 WLNR 13700585.

191. G.A. Res. 55/25, ¶2, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) (declaring that comprehensive, international cooperation is needed to prevent human trafficking in order to create measures aimed at preventing and punishing trafficking and protecting victims of trafficking). The protocol takes “into account the fact that, despite the existence of a variety of international instruments containing rules . . . to combat the exploitation of persons . . . there is no universal instrument that addresses all aspects of trafficking in persons. . . .” *Id.* see also John G. Bradbury, Note, *Human Trafficking and Government Contractor Liability: Is FAR 22.17 a Step in the Right Direction?*, 37 PUB. CONT. L.J. 907, 909 (2008) (opining that the United Nations’ definition “provides a basic framework for an understanding of the various forms of human trafficking”).

192. John G. Bradbury, Note, *Human Trafficking and Government Contractor Liability: Is FAR 22.17 a Step in the Right Direction?*, 37 PUB. CONT. L.J. 907, 909 (2008). Bradbury notes:

ameliorate this problem by enforcing laws against sex trafficking and punishing those who force women and children into the sex industry.

Since the passage of the VTPA in 2000, however, only a fraction of these sex traffickers have been prosecuted.¹⁹³ It is clear that this law, while aiding in the prosecution of sex traffickers, has not had a tremendous impact on the international and domestic sex trade.¹⁹⁴ Congress is trying to address this shortcoming by increasing the federal government's ability to fight sex trafficking and to prosecute domestic sex workers. Yet the two trades are not interchangeable. Those who work in the commercial sex industry feel that decriminalization would allow them to be safer by lessening the number of murders and rapes committed against consensual sex workers.¹⁹⁵ While it is not necessary that prostitution be decriminalized as an answer to this bill, the decriminalization debate is evidence of the fact that prostitution is not a clear-cut issue. Because different areas of the United States have different opinions of and laws concerning prostitution, it is unfair to the states to strengthen prostitution laws on a federal level. Equating consensual commercial sex acts with non-consensual sex trafficking is inherently discriminatory against the women who are selling sex by choice. Because of this, Congress should vote to exclude the William Wilberforce Reauthorization Act from the VTPA.

Human trafficking is a serious problem that has global effects. Between 700,000 and 900,000 victims are trafficked across borders each year world-wide. Human trafficking is often perpetrated by organized criminal networks profiting \$7 to \$10 billion annually from the practice. Congress found that traffickers primarily target impoverished women and girls who reside in war-torn countries. Trafficking is a problem that preys on the most vulnerable and exploits that vulnerability.

Id.

193. Taina Bien-Aime, *Protecting Pimps and Traffickers*, THE HUFFINGTON POST, July 15, 2008, http://www.huffingtonpost.com/taina-bienaime/protecting-pimps-and-traf_b_112929.html.

194. *Id.*

195. Jesse McKinley, *San Francisco's Prostitutes Support a Proposition*, N.Y. TIMES, Nov. 1, 2008, at A10, available at www.nytimes.com/2008/11/01/us/01prostitute.html.